United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 16, 2003

TO : Ronald K. Hooks, Regional Director
Ruth Small, Regional Attorney
Thomas H. Smith, Jr., Assistant to the Regional Director
Region 26

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Memphis Publishing Co. d/b/a 240-3367-5075
The Commercial Appeal 240-3367-5076
Case 26-CA-20419 240-3367-5076

SUPPLEMENTAL MEMORANDUM

This memorandum supersedes the prior Advice memorandum in this case dated August 4, 2003.

This Section 8(a)(5) case was submitted for advice as to whether the Board should defer to an arbitration award under Spielberg/Olin.[1] We initially decided that deferral to the arbitration award was not appropriate, and directed the Region to issue a complaint, absent settlement, alleging unlawful unilateral changes in work assignments. On further consideration, we have concluded that the Region should dismiss the charge, absent withdrawal, because the arbitration award was not palpably wrong.

FACTS

The Commercial Appeal (the Employer) publishes a daily newspaper in Memphis, TN. A group of journeyman pressmen and apprentices and pressroom assistants working for the Employer are represented for purposes of collective bargaining by the Graphic Communications International Union, Local 231-M (the Union). The Employer and the Union are parties to a collective-bargaining agreement effective February 1, 1997 through January 31, 2001. The parties agreed to extend the effective period of the Agreement through negotiations for a successor agreement, which opened in late 2000 and are ongoing.

Article II, Section I of the Agreement states in its entirety:

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[1] Spielberg Mfg. Co., 112 NLRB 1080 (1955); Olin Corp., 268 NLRB 573 (1984).

> The number of men required to perform the work available in the Publisher's pressroom (which includes the platemaking room) and the manner of operation, will be at the sole discretion of the foreman.

Until the mid-1980's, the task of clearing paper waste from the pressroom was assigned to members of the Paper Handlers Union.[2] This union was decertified, and the waste paper cleanup then became the responsibility of porters/housekeepers, who were members of the Newspaper Guild. At no time were members of Local 231-M under any obligation to perform the task of clearing the waste paper from the pressroom floor.

Beginning in January 2001, the Employer included in its contract proposals that members of the bargaining unit be responsible for clearing the production waste. This proposal was repeatedly rejected by the Union.

On October 3, 2001, although the parties had not reached impasse, the Employer unilaterally implemented the proposal and began requiring press operators to clean the production waste from the pressroom floor. In response, on October 9, 2001 the Union filed a grievance and an unfair labor practice charge. On December 21, 2001, the Region administratively deferred the charge pending the outcome of the arbitration proceeding.

On January 20, 2003, the arbitrator issued an award concluding that the Employer had the contractual right to assign the work without first bargaining. The arbitrator relied on an article in the collective bargaining agreement, which he construed to be a broad management rights clause. The relevant portion of the opinion and award states:

> Although there is no "management rights" article in the parties collective bargaining agreement, Article II, Section I, is an agreement by the parties that the "manner of operation will be at the sole discretion of the foreman." This is a

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[2] During normal business operations, printing presses in the Employer's pressroom generate paper waste, which accumulates on the floor of the pressroom. While the exact amount of waste is unclear, it is uncontested that thousands of pounds of paper waste are created per shift. The pressroom must be cleaned of this paper, which is then gathered and sold as bulk pulp waste. The handling of this waste is thus a significant duty, and not a trivial issue within the pressroom.

> broad grant of authority. The foreman is elsewhere described as the management's representative. It seems clear to me that the determination of the duties assigned to the various employees covered by the Agreement is, therefore, management's determination - absent a provision elsewhere in the Agreement prohibiting such an assignment. While the work of picking up trash (both production and non-production) was once the province of another union, that union's decertification leaves management the authority to assign the work to others (again providing there is no contractual prohibition against doing so). I find no provision of the Agreement prohibits the assignment in question.

By letter dated March 19, 2003, the Charging Party requested that the Region set aside the arbitration award and find the Employer violated Section 8(a)(5) of the Act.

ACTION

We conclude that the Region should defer to the arbitrator's award, as it is not "clearly repugnant" to the Act. Accordingly, the charge should be dismissed absent withdrawal.

Where arbitration proceedings are fair and regular, all parties have agreed to be bound by the award, and the arbitrator has considered the unfair labor practice issue, the Board finds Spielberg/Olin deferral inappropriate only where the award is "clearly repugnant" to the Act and "palpably wrong"[3] When making a determination as to whether an award is "clearly repugnant," the Board examines all the circumstances, including the contract language, evidence of bargaining history, and past practices between the parties.[4] The party seeking to set aside the arbitration award carries the burden of showing that deferral is not appropriate and that the Board should consider the unfair labor practice charge on its merits.

The Board has consistently held that a waiver of bargaining rights must be "clear and unmistakable," and that a generally worded management rights clause will not in

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[3] Id. The first three factors have been met here; the only issue is whether the decision is "clearly repugnant."

[4] Southern California Edison Co., 310 NLRB 1229, 1231 (1993).

itself be interpreted as a clear and unmistakable waiver.[5] On the other hand, the Board has deferred to arbitral awards which did not apply the statutory standard of clear and unmistakable waiver, so long as the arbitrator relied on contractual language, bargaining history and/or past practice to determine that the parties intended to permit the unilateral action at issue.[6]

Here, the arbitrator concluded that Article II of the parties' agreement – which states that management, through its foreman, may control the "manner of operation" of the pressroom – was a "broad grant of authority" that included the right to determine which duties would be assigned to employees in the pressroom. The arbitrator rejected the Union's argument that the Employer's conduct here was foreclosed by Article X of the contract, which states that the "office agrees to keep the pressroom clean"; rather, he concluded that the most reasonable interpretation of Article X was not that management (the "office") had agreed to clean the pressroom but rather that it had agreed to insure cleanliness in the pressroom by assigning cleaning work to the appropriate employees. Thus, he found that Article X was not inconsistent with interpreting Article II as an agreement to grant the Employer wide authority over work assignments such as that at issue here. The arbitrator also

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[5] See Rockwell International Corp., 260 NLRB 1346, 1347 (1982); Johnson-Bateman Co., 295 NLRB 180, 185 (1989). See also Suffolk Child Development Center, 277 NLRB 1345, 1350 (1985).

[6] See Southern California Edison Co., 310 NLRB at 1231 (Board deferred to arbitration award permitting unilateral implementation of drug testing program where contract gave employer "the right to draft reasonable safety rules for employees," and the parties' past practice and bargaining history supported conclusion that this was a safety rule); Dennison National Co., 296 NLRB 169, 170 n. 6 (1989) (Board deferred to arbitration award permitting unilateral elimination of a job classification where arbitrator relied on the parties' past practice and a broad management rights clause to conclude that the parties intended to reserve this type of decision to the employer). Compare Armour & Co., 280 NLRB 824 (1986) (deferral not appropriate where arbitrator had merely determined that nothing in the contract prohibited the employer from taking the unilateral action in question; the contract issue that arbitrator resolved was not factually parallel to the statutory issue because an employer can violate its statutory obligation without violating the collective-bargaining agreement); Kohler Mix Specialties, 332 NLRB No. 61 (2000) (same).

considered evidence indicating a past practice of the Union's having accepted without challenge some similar unilateral changes in employee responsibilities. Finally, the arbitrator rejected the Union's argument that Article II could not have been intended to include this kind of work assignment where the Employer had proposed in bargaining that the pressmen take on waste removal duties and the Union had rejected that proposal; although he did not explain his rejection of that argument, it is apparent that he credited the Employer's assertion that it raised the issue in bargaining, notwithstanding its managerial rights under the extant contract, because it wanted to give the Union an opportunity for input into the process of determining how to improve cleanliness in the pressroom.

Although the arbitrator also relied on his finding that nothing in the agreement prohibited the unilateral work assignment, this case is different from Armour and Kohler, supra, in that he identified a specific provision of the agreement that he concluded affirmatively privileged the unilateral conduct. The arbitrator's failure to apply the Board's "clear and unmistakable" standard does not in itself make deferral inappropriate.[7]

Accordingly, we conclude that the award is not "palpably wrong" and does not violate the "clearly repugnant" standard as established in Spielberg. The Region should dismiss the charge, absent withdrawal.

B.J.K.

[7] See Southern California Edison Co., 310 NLRB at 1231.